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Before the
Federal Communications Commission
Washington, D.C. 20554

Jul 19 8 30 AM '04

In The Matter of

MB Docket No. 04-191

San Francisco Unified School District

For Renewal of License for Station KALW(FM),
San Francisco, California

Facility ID No. 58830
File No. BRED-19970801YA

HEARING DESIGNATION ORDER AND NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 17, 2004

Released: July 16, 2004

By the Commission: Commissioners Copps and Adelstein concurring and issuing a joint statement.

1. The Commission has on file Golden Gate Public Radio's ("GGPR") November 3, 1997, *pro se* petition to deny ("Petition") the captioned application of the San Francisco Unified School District ("SFUSD") for renewal of the license of station KALW(FM), San Francisco, California.¹ We also have on file SFUSD's February 9, 1998, Motion to Strike the subsequent (January 28, 1998) verifications appended to the Petition, GGPR's February 18, 1998, Opposition² to that motion and SFUSD's March 18, 1998, reply, SFUSD's March 18, 1998, Motion to Dismiss the Petition,³ and GGPR's April 1, 1998, Opposition. Additionally, we consider SFUSD's April 5, 2001, and August 1, 2001, responses to separate staff inquiries. For the reasons set forth below, we treat the GGPR petition as an informal objection, grant it to the extent indicated, and designate the KALW(FM) license renewal application for evidentiary hearing. It appears that SFUSD has failed to timely place or retain in the KALW(FM) public inspection file quarterly issues/programs lists and supplemental ownership information, while certifying in its renewal application that it had done so.⁴ We will therefore specify false certification and

¹ SFUSD filed an opposition to the petition on January 20, 1998, to which GGPR replied on February 18, 1998.

² GGPR's reply to SFUSD's opposition to its petition and its opposition to SFUSD's motion to strike are consolidated in its February 18, 1998, pleading.

³ Also on March 18, 1998, SFUSD filed a Motion to Strike GGPR's Reply and a "Motion to Place Under Seal, Redact, or Remove Exhibit" certain proprietary information contained in GGPR's February 18, 1998, reply pleading. The latter motion was granted by the staff on February 5, 2001. See *Letter to Ernest T. Sanchez, Esq.*, reference 1800B3 (Chief, Audio Services Division, Mass Media Bureau).

⁴ The requirement that noncommercial educational station licensees maintain ownership reports was formerly set forth in 47 C.F.R. § 73.3615(g) and is now set forth in 47 C.F.R. § 73.3527(e)(4). The quarterly issues/programs list requirements were formerly found in 47 C.F.R. § 73.3527(a) and are now described in 47 C.F.R. § 73.3527(e)(8). See *Review of the Commission's Rules Regarding the Main Studio and Public Inspection Files of Broadcast* (continued...)

misrepresentation issues regarding SFUSD's representations in the renewal application that the KALW(FM) public inspection file contained all required materials.

2. **Pleadings.** In its Petition, GGPR alleges that SFUSD "failed to adequately maintain" its local public inspection file by failing to include in the file supplemental ownership reports, issues/programs lists, and donor lists. GGPR states that SFUSD certified in the subject renewal application that all these reports and lists were contained in its local public inspection file, when SFUSD knew at the time it filed the subject application that, in fact, they were not. GGPR also alleges that SFUSD "knowingly and deliberately" made misrepresentations in its application for renewal of license and in its Equal Employment Opportunity Program Report and that these misrepresentations call into question SFUSD's qualifications to remain a Commission licensee. Specifically, GGPR asserts that SFUSD failed to comply with the Equal Employment Opportunity ("EEO") requirements stated in Section 73.2080, while certifying in its renewal application that it had done so.

3. In its opposition, SFUSD states that GGPR is essentially a collection of "disgruntled" former KALW(FM) employees who were dissatisfied with station management. SFUSD argues that the petition should be dismissed because GGPR lacks standing and has failed to comply with the requirements of Section 309(d) of the Communications Act⁵ and the Commission's rules. In addition, SFUSD maintains that, notwithstanding the alleged procedural deficiencies of GGPR's petition, the petition does not establish a substantial or material question of fact to warrant designation of its license renewal application for hearing.

4. **Procedural Matters. Standing.** When challenging an application pursuant to Section 309(d)(1) of the Communications Act of 1934 (the "Act"), as amended, 47 U.S.C. Section 309(d), a petitioner must demonstrate party-in-interest status.⁶ The Commission accords party-in-interest status to a petitioner who demonstrates either that he/she resides in the station's service area or that he/she listens to or views the station regularly and that such listening or viewing is not the result of transient contacts with the station.⁷ In this regard, an organization may establish standing to represent the interests of local listeners or viewers. To do so, it must provide the affidavit of one or more individuals entitled to standing indicating that the group represents local residents and that the petition is filed on their behalf.⁸ In the instant case, GGPR's initial "petition" does not contain the required affidavit. GGPR submitted in its February 18, 1998, reply pleading two affidavits from GGPR principals indicating that they each reside within the KALW(FM) listening area and are each members of the KALW(FM) listening audience. This

(... continued from previous page)

Television and Radio Stations, 13 FCC Rcd 15691 (1998), *recon. granted in part*, 14 FCC Rcd 10922 (1999).

⁵ 47 U.S.C. § 309(d).

⁶ 47 U.S.C. § 309(d)(1).

⁷ See *Tabback Broadcasting Company*, 15 FCC Rcd 11899, 11900 n. 3 (2000), and *Maumee Valley Broadcasting, Inc.*, 14 FCC Rcd 21734 (1999).

⁸ See *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 F.C.C.2d 89 (1980); see also *Infinity Broadcasting Corp. of California*, 10 FCC Rcd 9504 (1995); *Tabback Broadcasting Company*, *supra*, and *Niles Broadcasting Company*, 7 FCC Rcd 5959 (1992).

attempt to cure the procedural defect in the Petition is untimely.⁹ We therefore will treat GGPR's Petition as an informal objection under Section 73.3587.

5. *Service and Verification of pleading.* A petitioner must serve a copy of its petition to deny on the applicant.¹⁰ GGPR did not serve SFUSD with a complete copy of the petition until December 11, 1997, more than one month after filing the petition with the Commission.¹¹ We find that GGPR has not offered any compelling reason to justify this delay between the filing of the petition and its service on SFUSD.¹² Further, SFUSD contends, and we agree, that the petition did not comply with the verification requirements of Section 1.52 of the Commission's rules.¹³ However, in light of our decision to accept the GGPR pleading as an informal objection, we decline to dismiss it for failure to comply with the requirements of Sections 1.47 and 1.52.¹⁴

6. *The GGPR Reply.* In its February 17, 1998, reply, GGPR raises two arguments for the first time: (1) that SFUSD lacked a designated Chief Operator and has failed to designate an Interim Chief Operator since November 4, 1997;¹⁵ and (2) SFUSD failed to comply with the terms of the Public Telecommunications Funding Program ("PTFP") grant it received from the National Telecommunications and Information Agency ("NTIA"). With regard to this latter allegation, GGPR claims that SFUSD failed to renew a lien required to protect NTIA's interest in the event that it could not fulfill its obligations under the grant and failed to file required annual reports with NTIA regarding the status of the equipment

⁹ See *Infinity Broadcasting Corp. of California*, 10 FCC Rcd at 9506 (petitioner who does not establish standing in its petition cannot cure the failure in its reply).

¹⁰ See 47 U.S.C. § 309(d)(1); 47 C.F.R. § 1.47.

¹¹ GGPR acknowledges that it served SFUSD with an "incomplete" copy of the petition (minus exhibits) on November 12, 1997.

¹² See *Columbia Broadcasting System, Inc.* 46 F.C.C.2d 903 (1974); *License Renewal Applications of Certain Broadcast Stations*, 59 F.C.C.2d 1335 (1976) and *D.W.S., Inc.*, 7 FCC Rcd 7170 (1992)(a petition to deny is procedurally defective if a copy is not served on the applicant). On December 5, 1997, the Chief, EEO Branch sent a letter to GGPR advising it that it could not be determined from GGPR's petition whether GGPR had served SFUSD with a copy in compliance with § 309(d)(1), and advised GGPR to submit proof of service within 20 days from date of the letter.

¹³ Under 47 C.F.R. § 1.52, a *pro se* petitioner must submit a declaration made before a duly authorized officer, e.g. a notary public, stating that the contents of the petition are true.

See also *Harrea Broadcasters, Inc.*, 52 F.C.C.2d 998 (1975) (verification is a declaration, made before any officer authorized by law to administer oaths [e.g., a notary public], that the contents of the petition are true.) GGPR is not represented by an attorney, and therefore the instant petition was required to be verified. Although GGPR's petition is signed by two of its principals, there is no evidence that the pleading was declared true before an appropriate officer.

¹⁴ See, e.g., *WTWV, Inc.*, 51 F.C.C.2d 1247, 1248 n.4 (1975).

¹⁵ GGPR references an affidavit from Dierdre Kennedy that Dave Evans, SFUSD's designated Chief Operator, was critically injured in an automobile accident on November 4, 1997, remaining in a coma until his death on January 17, 1998. *Declaration of Dierdre Kennedy* at 2-3. It provides no evidence to support its contention that SFUSD did not appoint a new Chief Operator in light of Mr. Evans' incapacity and subsequent death.

acquired with NTIA funding. These two arguments are improperly raised and will not be considered.¹⁶ GGPR has not explained why these arguments could not have been raised in the Petition. Moreover, even were the NTIA allegations raised in the petition to deny, they would lie within the jurisdiction of NTIA and should be resolved there.

7. **Substantive matters.** In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Communications Act. That section provides that if, upon consideration of the application and pleadings, we find that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Communications Act or the Commission's Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.¹⁷ If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”¹⁸

8. **Public File.** Section 73.3527 of the Commission's rules requires all licensees of noncommercial educational broadcast stations to maintain a public inspection file containing designated information. Among the materials required to be in the public inspection file are copies of every ownership report and related materials filed by the station,¹⁹ and issues/programs lists for each quarter describing the programs that represent “the station's most significant treatment of community issues during the preceding three month period.”²⁰ Both the ownership reports and the issues/programs lists are required to be placed in the public inspection file in a timely manner and retained until the Commission acts on the station's renewal application.²¹

9. The purpose of this requirement is to provide the public with timely information at regular intervals throughout the license period.²² When lapses occur in maintaining the public file, neither the negligent acts or omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation.²³ The evidence indicates that

¹⁶ See 47 C.F.R. § 1.45(c) (“[t]he reply shall be limited to matters raised in the oppositions . . .”).

¹⁷ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, 11 FCC Rcd 6363 (1996).

¹⁸ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

¹⁹ 47 C.F.R. §§ 73.3527(a)(3) and 73.3615(g)(1997); 47 C.F.R. § 73.3527(e)(4) and 73.3613(g)(2003).

²⁰ 47 C.F.R. § 73.3527(a)(7)(1997); 47 C.F.R. § 73.3527(e)(8)(2003).

²¹ See, e.g., *Riverside Broadcasting, Inc.*, 15 FCC Rcd. 18322 (2000).

²² See, e.g., *Letter to Kathleen N. Benfield from Linda B. Blair, Chief, Audio Services Division*, 13 FCC Rcd 4102 (MMB 1997) (citing *License Renewal Applications of Certain Commercial Radio Stations*, 8 FCC Rcd 6400 (1993)).

²³ See *Padre Serra Communications, Inc.*, 14 FCC Rcd 9709 (1999) (citing *Gaffney Broadcasting, Inc.*, 23 F.C.C.2d 912, 913 (1970) and *Eleven Ten Broadcasting Corp.*, 33 F.C.C. 706 (1962)); *Surrey Front Range Limited Partnership*, 71 RR 2d 882 (FOB 1992).

SFUSD failed to keep the station's public inspection file complete and current as required by the rule. It appears, therefore, that SFUSD violated Sections 73.3527 and 73.3615(g) of the Commission's rules as follows:

- (1) The KALW(FM) public inspection file did not contain all of the supplemental ownership reports required by Sections 73.3527 and 73.3615(g) on August 1, 1997, when the subject license renewal application was filed.²⁴ Missing items include the 1995 ownership supplement, which was not signed and dated until December of 1997. Additionally, it appears that the 1993 ownership supplement was not executed and submitted until July 30, 1997, four years after it should have been placed in the public file.
- (2) The KALW(FM) public inspection file did not contain the quarterly issues/programs list required by then Section 73.3527(a)(7). That rule requires: (1) a brief narrative describing what community issues were given the station's most significant treatment (2) the programming that provided this treatment; (3) the time, date, duration, and title of each program in which the issue was treated.

10. With respect to the issues/programs list requirement, SFUSD states that it and the KALW(FM) present management "believe that [the KALW(FM)] public inspection files, as of August 1, 1997, contained all required issues/program list materials for the entire period in question."²⁵ However, SFUSD admits that, when the present management reviewed the issues/programs list file in preparing its response to the staff's February 5, 2001, inquiry letter, it found only the "nationally produced NPR issues/programs lists" but not the "specifically prepared lists with respect to locally produced programs." SFUSD indicates that it is "unable to explain what may have happened" to the missing lists of issues covered by its locally produced programs. However, it argues that the KALW(FM) quarterly program guides,²⁶ plus the list of issues of public importance that received treatment in programs provided to KALW(FM) by National Public Radio, are sufficient to satisfy the requirements of Section 73.3527 regarding issues/programs lists. SFUSD enclosed "representative samples" of the file's contents, including one of its quarterly program guides and an "issues" list derived from a list of NPR programming aired by KALW(FM). This latter submission consisted of a computer-generated list of NPR programming aired by KALW(FM) from April 1-July 1, 1997, to which was affixed a general "subject list" of topics allegedly covered during the specified period; it does not specify which program(s) specifically addressed the listed topics.

11. We disagree with SFUSD's claim that its listing of NPR programming and general topic list satisfy the issues/programs list requirement in Section 73.3527. A licensee is required to identify issues of importance to its listeners and provide programming responsive to those interests. The pertinent Commission rule requires that the licensee place a list of programs providing the "most significant treatment" of identified issues in its public file on a quarterly basis; the quarterly list requirement does not distinguish between self-produced and acquired programming. Nevertheless, simply typing a list of topics on a downloaded NPR programming list does not fulfill this requirement. Thus, SFUSD appears to

²⁴ Former SFUSD Superintendent Waldemar Rojas signed the renewal application, certifying that all representations made therein were accurate, on July 30, 1997.

²⁵ SFUSD April 5, 2001, letter at 5.

²⁶ The Program Guide is a quarterly publication describing the weekly programming and special features to be aired on KALW(FM) during a specified three-month period.

have violated Section 73.3527 from 1991 – when the first issues/programs list for KALW(FM) after the station's last renewal grant was to be placed in the station's public inspection file – until April 5, 2001, when SFUSD assured the Commission that its public inspection file was complete.

12. We reject SFUSD's contention that it must "create lists for each and every one of its locally produced programs each quarter, in addition to the NPR quarterly issues/program lists which are already in the files."²⁷ SFUSD has produced a list of topics from an NPR programming guide. It has provided no information on non-NPR-produced programming. We do not require a list of issues covered in each of its locally produced programs, nor do we require that important issues be covered in local, as opposed to nationally syndicated, programming. In fact, the rule draws no distinction between locally produced and nationally syndicated programming, and the rule does not contemplate production of issue lists for any individual programs. We simply require that the licensee identify issues of importance to its community and identify specific programming it broadcast responsive to those issues. SFUSD cannot locate the lists it created for programs it produced, and it must instead rely on its quarterly program guide and its downloaded lists of NPR programs it claims to have aired. As noted above, these are insufficient.

13. Further, we reject SFUSD's speculative suggestion that GGPR may be partly responsible for the disappearance of the program/issue lists. SFUSD states that one document – a three-page listing of issues covering a period from June 1995 through July 1997 – was included as an attachment to GGPR's petition to deny but is now missing from the KALW(FM) public inspection file. SFUSD has provided no credible evidence that GGPR was involved in the disappearance of documents, and it admits that "KALW(FM)'s public inspection file, until recently, was located in a file cabinet in a publicly accessible location in its offices and was never locked, so that any station employee had access to those files."²⁸

14. *Misrepresentation.* SFUSD checked "yes" on FCC Form 303-S, page 3, question 2,²⁹ which asks, in pertinent part:

Has the applicant placed in its public inspection file at the appropriate time the documentation required by 47 C.F.R. § 73.3527?³⁰

²⁷ SFUSD April 5, 2001, response letter at 7.

²⁸ April 5, 2001, response at 2.

²⁹ SFUSD also checked "yes" on FCC Form 303-S, page 3, question 1(b), which asks:

Have the following reports been filed with the Commission: The applicant's Ownership Report (FCC Form 323 or 323-E) as required by 47 C.F.R. 73.3615?

Although GGPR references that portion of Section 73.3615 requiring the filing of ownership reports and supplemental ownership reports *with the Commission*, GGPR bases its petition on SFUSD's failure to retain these reports in its public inspection file. The petition contains no factual representation regarding what was or was not in the Commission's Reference Information Center. We take official notice, however, of the fact that the KALW(FM) file in the Commission's Reference Information Center contains no ownership or supplemental ownership reports – other than those submitted in SFUSD's April 5, 2001, response to a staff inquiry letter – subsequent to January 31, 1991.

³⁰ This documentation included, in pertinent part: ownership reports and related material, issues/programs lists and donor lists. See 47 C.F.R. § 73.3527(e)(2001), 47 C.F.R. § 73.3527(a)(1997)

In its petition, GGPR claims SFUSD was aware that certain public file documentation was missing and that SFUSD did not adequately maintain issues/program lists when it filed the renewal application. GGPR bases its misrepresentation allegations on the declarations of Dave Evans ("Evans") and Susan Hecht ("Hecht"), a former KALW(FM) employee and volunteer, respectively. GGPR submits an affidavit from Evans (Exhibit C to the Petition) in which Evans states that in August 1996, he had a meeting with KALW(FM) Station Manager at the time, Jeffrey Ramirez³¹ "to discuss problems that [Evans] thought needed attention." At that time he advised Ramirez that the public inspection file "was a mess and it needed his immediate attention" and that ownership and quarterly issues reports had not been placed in the file. Hecht states that in June, 1997, Ramirez requested that she inspect the public file "for license renewal purposes."³² Finding the file "disorganized and incomplete," she itemized the contents of the file and issued a report entitled "License Renewal Materials - In Files at Present," which she claims listed missing documentation.³³ In this regard, GGPR submits that SFUSD's board changed three times since the last ownership report of 1991 but the file contained no supplemental ownership reports reflecting the changes.³⁴ In addition, GGPR states that public file did not include twenty-five issues/programs reports for the period between January 1, 1991, and March 31, 1994, and that SFUSD failed to file donor lists for a period of two years. GGPR concludes, based on the Evans and Hecht reports to Ramirez, that SFUSD "was aware eleven months before license renewal" that the public file contained the specified deficiencies, yet SFUSD indicated otherwise in the subject application.

15. In its Opposition to the Petition, SFUSD submits a declaration from former Station Manager Ramirez. Ramirez states under penalty of perjury that he answered question 2, concerning the filing and retention of its issues/programs lists and ownership reports, in the affirmative because the lists and reports were fully accounted for during his tenure, "which is what he understood the rule to call for." SFUSD submits that GGPR's assertions concerning the non-filing of donor lists are misplaced because KALW(FM) did not have any donors whose donations were earmarked for specific programs, which is a prerequisite for establishing a donor list.³⁵

16. Ramirez also states that he vaguely recalls having a meeting with Evans "some time in August, 1996," during his first weeks at KALW(FM) as general manager. However, he recollects that the conversation was "confusing" and that Evans "refused" to be specific about the public file deficiencies. Ramirez states he nevertheless attempted to ascertain the contents of the file to assure their conformance with the Commission's rules, and that "review and updating" the file has been "an ongoing process." Concerning Hecht's affidavit, Ramirez states he assigned Hecht the task of reviewing the file in June 1997, "as part of the review and update process," but he did not consider the list she produced to

³¹ Mr. Evans indicates that at the time of the meeting he was KALW(FM)'s Chief Engineer. It appears that Mr. Ramirez resigned as KALW(FM) Station Manager in January of 1998.

³² See Exhibit D appended to GGPR's petition to deny.

³³ See Exhibit E appended to GGPR's petition to deny. The report is not dated, and it consists of a list of items purportedly found in the KALW(FM) public inspection file. It notes the absence of several Annual Employee Reports and EEO Reports (Exhibit E, Page 1); that the "Problems & Programs" list is "incomplete" and "partial" (Exhibit E, Page 3); and that the "Program List" space is "Empty" (Exhibit E, Page 3).

³⁴ See Petition, Exhibit R, a listing of Board members as of July 1990 (the date of KALW(FM)'s previous license renewal), January 1991 (the date of the allegedly last ownership report in the file), January 1993, January 1995, and January 1997.

³⁵ See Section 73.3527(a)(8)(1997); Section 73.3527(e)(9)(2003).

be accurate, even surmising that she may have misunderstood his directions. Ramirez states that the subject application was the first renewal application he had ever prepared, and that although he believes he may have misunderstood what was required in responding to the questions, he responded "honestly and accurately" based on his knowledge of the file's contents, and his understanding of the advice of counsel and a broadcast industry trade association.

17. On February 5, 2001, the staff sent a letter to SFUSD indicating that SFUSD had not adequately addressed the specific allegations concerning the completeness of KALW(FM)'s public file on August 1, 1997, (the date that the license renewal application was filed) and requested that SFUSD submit certain information.³⁶ In its April 5, 2001, response, SFUSD states that the public file contained all the required ownership reports as of August 1, 1997. It also states "SFUSD and its present management"³⁷ also believe that all required supplemental reports were, in fact, present in the public inspection file on August 1, 1997." However, it admits that it "is unable to prove" that a specific 1995 supplemental report that should have been placed in the file "in January or February, 1995," but is dated "December, 1997," was in fact in the file on August 1, 1997.³⁸ Further, as noted above, SFUSD and the present KALW(FM) management state that they "believe" the public file contained all the quarterly issues/programs lists for the period in question and that they had no reason to disbelieve Ramirez's certification that the file contained the lists. However, their recent examination has indicated otherwise. Specifically, SFUSD states that its examination revealed that the file contained the quarterly issues/program lists for its nationally produced programming, but did not contain all the lists for its locally produced programming. SFUSD submits that it is "unable to explain" why the "25 specifically-created lists" for its locally produced programming are missing.

18. Regarding its donor list, SFUSD states that,

As a matter of policy and long-term practice, KALW(FM) does not solicit or accept underwriting support for specific programs. Rather, all underwriting funds are considered general support. If a particular underwriter requests that its underwriting announcement be aired during a particular day-part or program, KALW(FM) will honor that request. The underwriting funds in question are, nevertheless, not allocated to support for that program, or for any specific

³⁶ See Letter to Ernest T. Sanchez, Esq. from Linda Blair, Chief Audio Services Division (MMB 2001). The letter asked SFUSD, *inter alia*, if:

(a) On August 1, 1997, when the subject license renewal application was filed, did the KALW(FM) public inspection file contain all the ownership and supplemental ownership reports required to be kept in the file by then Section 73.3527?; (b) on August 1, 1997, did the KALW(FM) public inspection file contain all the issues/programs lists required by then Section 73.3527? Did any of the lists that were in the file contain the information required by Section 73.3527?; (c) on August 1, 1997, did the KALW(FM) public inspection file contain a complete listing of donors supporting specific programs, as required by then Section 73.3527?; and (d) was KALW(FM)'s public file currently complete?

³⁷ SFUSD indicated in its March 6, 2001 letter requesting additional time to respond that KALW(FM) had hired a new general manager-- its fourth since August 1, 1997, according to GGPR -- and wanted to involve this new general manager in all matters relating to the 1997 renewal application.

³⁸ We note that the 1993 supplemental ownership report, a copy of which is included with SFUSD's April 5, 2001, response, was apparently not signed or submitted until July 30, 1997, long after it should have been tendered but prior to the August 1, 1997, filing of the license renewal application.

program, and underwriting funds are not solicited on the basis of support for specific programs. Thus as a general matter, KALW(FM) has had no reason to file donor lists as required by Section 73.3527.

SFUSD indicates that the only exception to this policy is a weekly program, *Your Legal Rights*, supported by donations from the San Francisco Bar Association and the State Bar of California, as a public service to provide information about lawyer referral services. SFUSD states that to its "knowledge and belief," a listing of these donors, in connection with their support of *Your Legal Rights*, was in the KALW(FM) public inspection file on August 1, 1997.³⁹

19. Based on the foregoing discussion, it appears that the KALW(FM) public inspection file was not complete when the subject license renewal application was signed and filed with the Commission. It therefore appears that SFUSD falsely certified that it had placed all required documentation in the station's public file at the appropriate times in the subject license renewal application. We also believe that, as discussed below, GGPR has raised a substantial and material question regarding whether SFUSD intended to deceive the Commission by making the false certification.⁴⁰ Commission precedent holds that a misrepresentation is a false statement of fact made with intent to deceive the Commission.⁴¹ Lack of candor is a concealment, evasion, or other failure to be fully informative, accompanied by an intent to deceive.⁴² Fraudulent intent can be found from "the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity."⁴³ Intent can

³⁹ SFUSD did not consider the preferences expressed by those making donations during pledge drives to constitute "support for a specific program" such that the donor's pledge form or card must be kept in the public inspection file. Nonetheless, GGPR contests SFUSD's claim that it does not accept underwriting for specific programs. It points to two syndicated programs, *Car Talk* (for which it claims that the *San Francisco Chronicle* and the *San Francisco Examiner* are the exclusive local "underwriters") and *West Coast Live* (which it claims is sponsored by the Crystal Geyser Water Company). In an August 1, 2001, response to an additional informal staff inquiry, SFUSD emphatically asserts that (1) KALW(FM) does not produce *West Coast Live* and receives no support from Crystal Geyser Water Company in connection with the program, as the financial support is given directly to the program's producer, Sedge Thomson; and (2) *Car Talk* is produced and distributed by National Public Radio, and KALW(FM) does not seek or accept funding for this or any other nationally distributed NPR program. We see no basis on this record for further consideration of this matter.

⁴⁰ See, e.g., *Ronald E. Patterson & Cal E. Varner d/b/a Capitol City Broadcasting Company*, 8 FCC Rcd 8478 (Rev. Bd. 1993) (designating false certification and misrepresentation issues against applicant when there were substantial and material questions about the applicant's financial qualifications which could not be resolved based upon the pleadings). See also *LUJ, Inc.*, 17 FCC Rcd 16980 (2002) (petitioner did not raise a substantial and material question of fact regarding whether assignor and assignee intended to deceive the Commission by making a false certification). The Commission has stated that false certifications are abuses of the Commission's processes which waste Commission resources and which may not only break Commission rules, see 47 C.F.R. § 1015, but may subject the applicant to a monetary forfeitures under 47 U.S.C. §§ 502 and 503, as well as criminal liability under 18 U.S.C. Section 1001. *In the Matter of Financial Certifications by Applicants for Broadcast Station Permits*, FCC No. 87-97 (Mar. 19, 1987). A false certification, like other false statements of fact made in FCC applications and pleadings, may of course also constitute misrepresentation under the Commission's rules and policies. *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6399 n.74 (1992).

⁴¹ *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 129 (1983).

⁴² *Id.*; *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020, 12063 (1995).

⁴³ *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991) (quoting *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980)).

also be derived from motive.⁴⁴ Because "the [Commission] relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing," federal appellate courts have recognized that "the Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency."⁴⁵

20. GGPR has submitted sufficient evidence -- particularly the allegations of Evans and Hecht that KALR(FM) management was repeatedly informed of the deficiencies in its public inspection file -- to raise a substantial and material question of fact calling for further inquiry into the candor of SFUSD's representations regarding the sufficiency of its public inspection file.⁴⁶ Certainly, SFUSD had a motive for falsely certifying that the KALW(FM) public inspection file was complete: not merely in order to obtain favorable action on its license renewal application,⁴⁷ but to conceal an apparent violation of the Commission rule governing the contents of the KALW(FM) public inspection file. If proven, GGPR's misrepresentation allegations would establish a "serious violation" that calls into question the propriety of granting the KALW(FM) renewal application under Section 309(k) of the Act. Accordingly, we will designate that application for evidentiary hearing, specifying appropriate issues.

21. *EEO/Misrepresentation.* GGPR also alleges violations of the EEO program requirements set forth in Section 73.2080(b) and (c) of the Commission's Rules in effect at the time the KALW(FM) license renewal application was filed. Specifically, GGPR alleges that SFUSD: (1) failed to post notices informing employees and applicants for employment of their EEO rights;⁴⁸ (2) failed to disseminate its EEO policy to prospective employees;⁴⁹ (3) failed to seek the cooperation of its employees' union to help implement the EEO program;⁵⁰ and (4) failed to promote individuals on a nondiscriminatory basis.⁵¹

⁴⁴ *Joseph Bahr*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994).

⁴⁵ *Contemporary Media, Inc. et al. v. FCC*, 214 F.3d 187, 193, 196 (D.C. Cir. 2000), citing *Schoenbohm v. FCC*, 204 F.3d 243, 247 (D.C. Cir. 2000).

⁴⁶ See 47 U.S.C. § 309(e); *WWOR-TV, Inc.*, 5 FCC Rcd 193, 197 n.10 (1990).

⁴⁷ See, e.g., *Hispanic Broadcast System, Inc.*, 16 FCC Rcd 8072, 8074 (2001); *Joseph W. Bollinger and Donna M. Bollinger*, 16 FCC Rcd 18107 (2001) (Commission will not infer intent to deceive merely because applicant submits allegedly false statements in an application on which it wants favorable action).

⁴⁸ See 47 C.F.R. § 73.2080(c)(1)(i) (1997).

⁴⁹ See 47 C.F.R. § 73.2080(c)(1)(ii) (1997). GGPR alleges that SFUSD did not provide an EEO notice in the print advertisement for the position of station manager or in the letter confirming the hiring of Enrique Palacios. GGPR Petition, at 7-8; Exhibits J, K.

⁵⁰ See 47 C.F.R. § 73.2080(c)(1)(iii). GGPR states that KALW employees are represented by the Service Employees International Union ("SEIU") and that the SEIU/SFUSD employment agreement is governed by Civil Service Commission rules on EEO, hiring practices, and other employment procedures. GGPR alleges that SFUSD failed to cooperate with SEIU by (1) refusing to follow Civil Service hiring requirements in the appointment of Clerk/Typist William Helgeson to the position of Operations Manager; and (2) by appointing "Provisional" personnel and independent contractors instead of hiring union-certified regular employees. GGPR states that SFUSD also did not file the appropriate documentation regarding these independent contractors with the Commission, in violation of 47 C.F.R. § 73.3613(c).

⁵¹ See 47 C.F.R. § 73.2080(c)(4) (1997). GGPR states that SFUSD did not inform its KALW employees, many of them qualified minorities and women, of job openings throughout the term of the license. GGPR also claims that SFUSD "did not practice recruitment" under then Section 73.2080(c)(1)(iv), but GGPR's allegation is unclear as to
(continued...)

GGPR states that KALW Station Manager Ramirez was aware of KALW(FM)'s failure to comply with EEO requirements⁵² and that SFUSD misrepresented that fact in the subject renewal application.⁵³

22. In its opposition, SFUSD denies violating any of the Commission EEO policies then in effect. It claims, among other things, that (1) SFUSD did in fact post notices informing employees and applicants of their EEO rights at SFUSD's Human Resources Department and at the government offices for the City and County of San Francisco, where all employment-related matters are handled by SFUSD; (2) SFUSD publishes prominent EEO notices on its job opening announcements and correspondence with prospective employees;⁵⁴ (3) none of GGPR's personnel complaints regarding the hiring of provisional employees or independent subcontractors is relevant to the question of whether or not SFUSD has "established, maintained, and carried out" an EEO program satisfying the Commission's guidelines; and (4) SFUSD did promote on a nondiscriminatory basis, as more than fifty percent of KALW(FM) full-time employees, including those in the upper four job categories, are members of a minority group, as is more than half of its governing board, the San Francisco Board of Education.⁵⁵ With respect to the charge of misrepresentation, not only does SFUSD deny that there were violations, but Mr. Ramirez affirms the truth of the representations made in the renewal application regarding KALW(FM)'s compliance with the Commission's EEO rules and policies.

(... continued from previous page)

the nature of the alleged violation. Petition, at 14-15. Given the lack of evidence, no further discussion is warranted with respect to this final allegation.

⁵² GGPR references the August 1996 meeting between Evans and Ramirez, in which Evans purportedly informed Ramirez that the station's EEO program was "out of date." See Exhibit C to GGPR's Petition.

⁵³ The FCC Form 396 ("Broadcast Equal Employment Opportunity Program Report") submitted with the license renewal application contained the following "Policy Dissemination" certifications on Page 3:

Notices are posted informing applicants and employees that the station is an Equal Opportunity Employer and that they have the right to notify an appropriate local, State, or Federal agency if they believe they have been the victims of discrimination.

Our station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin, or sex is prohibited and that they may notify the appropriate local, State, or Federal agency if they believe they have been the victims of discrimination.

We seek the cooperation of the unions represented at the station to help implement our EEO program and all union contracts contain a nondiscrimination clause.

⁵⁴ SFUSD Opposition, at 25; Ramirez declaration ¶¶ 1, 13, 14. These assertions are contradicted by Exhibits J (a KALW(FM) job announcement in the May 15, 1996 edition of *Education Week*) and K (form letter from Enrique Palacios purporting to confirm the hiring of a new employee), each of which are devoid of any reference to EEO policies. SFUSD counters that Exhibit K was an "obvious fraud," as it is only a draft of a letter actually sent out to successful applicants. SFUSD attaches to the Ramirez declaration an actual letter sent to Philip Morgan, an applicant for General Manager of KCLW(FM). That letter contains the notation "an equal opportunity employer" at its bottom. SFUSD also argues that the *Education Week* job announcement notice was immaterial because the form only asks for examples of such media announcements and Mr. Ramirez did not mention that advertisement or publication in his response to the form.

⁵⁵ Ramirez indicates additionally that "KALW was recently notified by the Corporation for Public Broadcasting that it is eligible for Community Service Grant and NPPAG funds because of its high percentage of minority employees and board members." Ramirez Declaration ¶ 15.

23. The United States Court of Appeals for the District of Columbia Circuit has held that the EEO program requirements in effect at the time of the alleged misconduct were unconstitutional.⁵⁶ Therefore, GGPR's allegations that SFUSD violated those requirements, even if true, would not warrant denial or designation of the subject application. Nevertheless, those requirements were in effect during the KALW(FM) license term here, as well as when the subject renewal application was filed, and applicants are not excused from accurately representing their compliance with those rules by their subsequent invalidation.⁵⁷ It appears from the record in this proceeding that there may have been minor deficiencies in the dissemination of SFUSD's EEO program during the subject license term.⁵⁸ Accordingly, SFUSD's representations in the KALW(FM) renewal application regarding the station's compliance with the Commission's EEO rules and policies appear to be incorrect. We find, however, that the evidence presented by GGPR and the record as a whole are insufficient to raise a substantial and material question as to whether SFUSD intended to deceive the Commission by making a false certification regarding its compliance with the Commission's then-existing EEO rules. We nevertheless caution SFUSD that it should exercise more care in the future to ensure that the information it submits to the Commission is accurate, because a false statement, even absent an intent to deceive, may constitute a violation of Section 1.17 of the Commission's rules, as revised last year.⁵⁹

24. Accordingly, IT IS ORDERED, that, pursuant to Section 309(e) and 309(k) of the Communications Act of 1934, as amended,⁶⁰ the captioned application of the San Francisco Unified School District for renewal of license of station KALW(FM), San Francisco, California IS DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent *Order*, upon the following issues:

1. To determine whether San Francisco Unified School District falsely certified its application with respect to the completeness of the KALW(FM) public inspection file and the effect thereof on its qualifications to be a Commission licensee.
2. To determine whether San Francisco Unified School District made misrepresentations of fact or was lacking in candor and/or violated Section 73.1015 of the Commission's Rules with

⁵⁶ *Lutheran Church - Missouri Synod v. FCC*, 141 F.3d 344, *pet. for rehearing denied*, 154 F.3d 487, *pet. for rehearing en banc denied*, 154 F.3d 494 (D.C. Cir. 1998). The Court did not find the anti-discrimination portion of the broadcast EEO rules to be unconstitutional.

⁵⁷ See, e.g., *CRC Broadcasting Company, Inc.*, 14 FCC Rcd 1038 (MMB 1999); *WRKL Rockland Radio, L.L.C.*, 14 FCC Rcd 1042 (MMB 1999) (Notice of Apparent Liability for failure to disclose discrimination complaint even though the EEO rules had been found unconstitutional; no evidence of intent to deceive present).

⁵⁸ For example, SFUSD submits a form letter on SFUSD letterhead to rebut GGPR's charge that SFUSD's confirmation letter to prospective employees did not contain a notice of KALW(FM)'s EEO policy. See Petition, Page 8 and Exhibit K; Opposition, Page 28 and Ramirez Declaration, Exhibit 7. The Letter submitted by SFUSD clearly indicates at its bottom that the sender is "an equal opportunity employer." It does not, however, inform applicants "that they have the right to notify an appropriate local, State, or Federal agency if they believe they have been the victims of discrimination." See also *supra* note 54 (some job announcements in educational trade publications did not contain an EEO policy reference).

⁵⁹ 47 C.F.R. § 1.17. See *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, 18 FCC Rcd 4016 (2003).

⁶⁰ 47 U.S.C. §§ 309(e), (k).

regard to its certification in the subject license renewal application that it had placed in the KALW(FM) public inspection file at the appropriate times the documentation required by Section 73.3527, and the effect thereof on its qualifications to be a Commission licensee.

3. To determine, in light of the evidence adduced pursuant to the specified issues, if the captioned application for renewal of license for station KALW(FM) should be granted.

25. IT IS FURTHER ORDERED, that, irrespective of whether the hearing record warrants an Order denying the renewal application for KALW(FM), it shall be determined, pursuant to Section 503(b)(1) of the Communications Act of 1934,⁶¹ whether an ORDER OF FORFEITURE in an amount not to exceed \$300,000 shall be issued against SFUSD for willful and/or repeated violations of Sections 73.1015, 73.3527, and/or 73.3613 of the Commission's Rules,⁶² which occurred or continued within the applicable statute of limitations.

26. IT IS FURTHER ORDERED, that, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended.⁶³

27. IT IS FURTHER ORDERED, that Golden Gate Public Radio and the Chief, Enforcement Bureau, ARE MADE PARTIES to this proceeding.

28. IT IS FURTHER ORDERED, that a copy of each document filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on the counsel of record appearing on behalf of the Chief, Enforcement Bureau. Parties may inquire as to the identity of such counsel by calling the Investigations and Hearings Division of the Enforcement Bureau at (202) 418-1420. Such service copy SHALL BE ADDRESSED to the named counsel of record, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B443, Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, that, in accordance with Section 309(e) of the Communications Act of 1934, as amended,⁶⁴ the burden of proceeding with respect to issues 1 and 2 shall be upon the applicant, and the burden of proof with respect to all issues shall be upon the applicant.

30. IT IS FURTHER ORDERED that, to avail themselves of the opportunity to be heard and the right to present evidence at a hearing in these proceedings, pursuant to Section 1.221 of the Rules,⁶⁵ the parties, in person or by its attorney, shall file within 20 days of the mailing of this Order, a written appearance in triplicate stating its intention to appear on the date fixed for hearing and to present evidence on the issues specified in this *Order*.

⁶¹ 47 U.S.C. § 503(b)(1).

⁶² 47 C.F.R. §§ 73.1015, 73.3527, and 73.3613.

⁶³ 47 U.S.C. § 503(b).

⁶⁴ 47 U.S.C. § 309(e).

⁶⁵ 47 C.F.R. § 1.221.

31. IT IS FUTHER ORDERED, that the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended,⁶⁶ and Section 73.3594 of the Commission's Rules,⁶⁷ give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.⁶⁸

32. IT IS FURTHER ORDERED that copies of this *Order* shall be sent *via* Certified Mail, Return Receipt Requested, and by regular first class mail to the following:

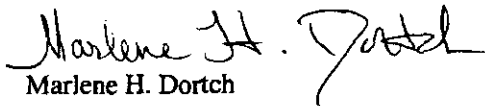
San Francisco Unified School District
500 Mansell Street
San Francisco, California 94134

Golden Gate Public Radio
484 Lake Park Avenue, Box 419
Oakland, CA 94610-2730

Ernest T. Sanchez, Esq.
The Sanchez Law Firm
2000 L Street, N.W., Suite 200
Washington, D.C. 20036

33. IT IS FURTHER ORDERED that the Secretary of the Commission shall cause to have this *Order* or a summary thereof published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION


Marlene H. Dortch
Secretary

⁶⁶ 47 U.S.C. § 311(a)(2).

⁶⁷ 47 C.F.R. § 73.3594.

⁶⁸ *Id.* Section 73.3594(g).

**JOINT STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN
CONCURRING**

Re: San Francisco Unified School District for Renewal of License for Station KALW(FM), San Francisco, California

We concur in the decision to designate KALW(FM)'s license renewal application for a hearing. There are factual questions at issue here that warrant further review. It is important for the Commission to ensure that licensees are meeting their obligation to serve their local communities and provide the public with timely and complete information about how they are meeting that obligation. It is also important for the Commission to take its public interest obligations seriously and establish an effective license renewal process.

That being said, we also have concerns about this decision. In recent months, the Commission has gone out of its way to avoid sending cases to hearings even when there were legitimate allegations of wrongdoing. In KALW(FM)'s case, there are questions as to whether the public file was complete and whether the station misrepresented the situation to the Commission. As just one example, in another recent case, there was also an incomplete public file as well as allegations of misrepresentation and material omissions in filings. In addition, in that case, there were also issues related to unauthorized transfer of control. Yet, in that case, the Commission, over our dissent, determined that it would not designate the case for hearing. When the Commission finally decides to make an example of a station and designate its case for a hearing, it chooses a small noncommercial broadcast station run by the local school district. We are troubled by the message we send when we send small, independent stations to hearings but give a pass to stations owned by larger media companies for troubling allegations.